

FILED

August 23, 2011

**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

Nunc Pro Tunc
April 6, 2010

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF THE LICENSE OF	:	
	:	Administrative Action
HENRY BORRELLI, D.P.M.	:	
License No. MD02273	:	FINAL ORDER OF
	:	DISCIPLINE
TO PRACTICE PODIATRIC MEDICINE	:	
IN THE STATE OF NEW JERSEY	:	
	:	
	:	

This matter was opened to the New Jersey State Board of Medical Examiners ("the Board") upon receipt of information which the Board has reviewed and on which the following findings of fact and conclusions of law are made;

FINDINGS OF FACT

1. Respondent, Henry Borrelli, D.P.M., is the holder of License No. MD02273 and has been licensed to practice podiatric medicine in the State of New Jersey since 1984.

2. On or about February 7, 2000, Respondent was indicted in the United States District Court for the Southern District of New York on three counts. Count One charged Respondent with conspiracy to commit health care fraud, mail fraud, and the crime of making false statements in connection with the payment of health care

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services in violation of Title 18, U.S.C., Section 371. Count Two charged Respondent with defrauding health care benefit programs, including Medicare, through his delivery of podiatric services at Citywide Footcare, P.C. from about 1991 through 1998, in violation of Title 18, United States Code, Section 1347. Count Three charged Respondent with conspiring to violate the Medicare statute by paying kickbacks in exchange for referrals to medical providers participating in the Medicare plan from about April 1994 to May 1997, in violation of Title 18, United States Code, Section 371.

3. On or about July 30, 2009, Respondent entered into a Plea Agreement, dated April 29, 2009, in which he agreed to plead guilty to Counts One through Three of Indictment 00 CR 92.

4. On January 6, 2010, Respondent was sentenced to eighteen (18) months imprisonment on each count to run concurrently, followed by a term of three (3) years of supervised release on each count to run concurrently. Respondent was also ordered to pay restitution to Medicare in the amount of \$93,481.

5. On or about April 6, 2010, Respondent surrendered for service of his term of imprisonment at the Federal Correctional Facility in Fort Dix, New Jersey.

CONCLUSIONS OF LAW

1. The above criminal conviction in the United States District Court for the Southern District of New York provides grounds to take disciplinary action against Respondent's license to

practice podiatric medicine in New Jersey pursuant to N.J.S.A. 45:1-21(f), in that Respondent has been convicted of a crime involving moral turpitude and relating adversely to the activity regulated by the Board.

2. The above criminal conviction in the United States District Court for the Southern District of New York provides grounds to take disciplinary action against Respondent's license to practice podiatric medicine in New Jersey pursuant to N.J.S.A. 45:1-21(k), in that Respondent has been convicted of committing and conspiring to commit health care fraud under Title 18, United States Code, Sections 371 and 1347.

DISCUSSION

Based on the foregoing findings and conclusions, a Provisional Order of Discipline was filed on July 1, 2010 seeking revocation of Respondent's license to practice podiatric medicine in the State of New Jersey. The basis for the Board's action was Respondent's convictions for committing and conspiring to commit health care fraud under Title 18, U.S.C., Sections 371 and 1347.

The Provisional Order of Discipline was subject to finalization by the Board at 5:00 p.m. on the 30th business day following entry unless Respondent requested a modification or dismissal of the stated Findings of Fact or Conclusions of Law by submitting a written request for modification or dismissal setting forth in writing any and all reasons why said findings and

conclusions should be modified or dismissed and submitting any and all documents or other written evidence supporting Respondent's request for consideration and reasons therefor.

In response to the Provisional Order of Discipline, Respondent's attorney Susan Fruchtman, Esq. submitted correspondence dated August 16 and October 29, 2010, attaching the January 6, 2010 sentencing transcript from the District Court, Southern District of New York. In her submissions she requested that the Board dismiss the Provisional Order, and in the alternative she sought an evidentiary hearing before the Board to be scheduled after Respondent's release from prison. Additionally she proposed that any disciplinary action other than an eighteen (18) month suspension be held in abeyance until Respondent's release and ability to appear at a hearing. Respondent's counsel further asserted that it was Respondent's employer who submitted the fraudulent health care claims which occurred over twelve years ago, and that Respondent has since owned a podiatry practice in New Jersey for eleven years without any violations of Board statutes or regulations.

Following Respondent's submission the Board scheduled the matter to be considered on April 13, 2011. Respondent requested a deferral. By correspondence dated March 11 and March 21, 2011, the Board denied Respondent's request for deferral of the April 13, 2011 hearing until Respondent's release from prison and then denied

Respondent's request for modification of the penalty.¹

Respondent's attorney was advised that she may either seek Respondent's release from prison so he could appear on his own behalf or instead, as his attorney, provide information and/or appear on Respondent's behalf with witnesses and documentary materials at the hearing.

On April 13, 2011, a bifurcated hearing first considering liability and then providing an opportunity for mitigation, was held before the Board. Respondent did not appear in person but was represented by his attorney Susan Fruchtman, Esq. In a pre-hearing motion, counsel renewed her request that the Board defer the hearing until Respondent could personally appear after he served his term of incarceration and was released from prison. In support of her motion, she contended that based on the Administrative Procedure Act (APA) N.J.S.A. 52-14B-1 et seq. Respondent was entitled to be heard. She also cited In re the license of Fanelli, 174 N.J. 165 (2002) in support of Respondent's claim to entitlement to appear and be present at the hearing, and present evidence and arguments on the issues. Ms. Fruchtman argued that under Fanelli, Respondent should have an opportunity to dispute in person the findings concerning professional misconduct and to argue that license revocation is not the appropriate sanction.

¹ The Board first considered the matter on the papers and subsequently on its own motion determined to reopen the matter to provide Respondent with an oral opportunity to be heard.

The Board is cognizant that the APA mandates that a professional license shall not be revoked unless the licensee has been afforded an opportunity for a hearing [emphasis added]. The Board determined that Respondent has, in fact, been granted this opportunity, thus the Board has satisfied its obligation under the APA. Respondent had been given sufficient notice of the hearing, having received notice months in advance at the time the Provisional Order of Discipline was filed. It is Respondent's option to seek to obtain release from prison in order to appear in person at a hearing. Respondent had available to him the opportunity to seek a furlough from his incarceration in order to appear in person at the hearing or by counsel, or in the alternative, to respond in writing. Respondent did not provide documentary evidence of having applied for and/or having been denied a request for a release or furlough.²

Further, Respondent's case is distinguishable from Fanelli in that Dr. Fanelli's entitlement to a hearing was based in part on the determination that the Board did not have the plea or sentencing transcripts in the record before it and therefore did not have a sufficient understanding of the underlying facts that had resulted in Dr. Fanelli's guilty plea. Here, the Board has

² For the first time on the date of the hearing his attorney and wife orally claimed without substantiation, that he had sought release from prison authorities which was denied.

available a record which includes Respondent's plea agreement and sentencing transcripts. The underlying facts of Respondent's crime are clearly available to this Board. Another important factor is that the Board is satisfying Respondent's due process and statutory rights by providing him an **opportunity** to be heard. His attorney is present to argue on his behalf as are multiple character witnesses, and counsel represented in her pre-hearing motion that Respondent's wife would read into the record a statement written by respondent. Finally, if Respondent's contention that a personal appearance is mandated was to be upheld, the Board would be precluded from taking disciplinary action against the professional license of convicted felons incarcerated for their crimes. The anomalous result would be that when licensees were convicted of crimes serious enough to warrant incarceration such prisoners could maintain active licenses to practice podiatric medicine with the Board unable to consider whether action was appropriate until their release, which could be months or even years in the future. For

the reason's stated above, Respondent's motion was denied.

The Board then proceeded to the liability phase of the hearing as the Deputy Attorney General introduced into evidence copies of the Indictment, Plea Agreement, Judgment in the Criminal Case and the Plea and Sentencing Transcripts. Respondent's attorney did not contest the fact of the convictions which form the basis for the State's disciplinary action nor did she dispute that the crimes

to which Respondent pled guilty and which led to the conviction constituted crimes involving moral turpitude and/or related adversely to the profession of podiatry. Respondent's attorney did not dispute any of the findings. She focused her argument during the liability phase on mitigation of penalty and attempted to go behind respondent's clear admission memorialized in the guilty plea. Primarily she asserted that Respondent did not have control over the billing for his services which were submitted by his employer.

The Board deliberated in closed session then moved and voted in open session that the State had met its burden of proof. Respondent was convicted of a crime of moral turpitude and one related adversely to the profession in violation of N.J.S.A. 45:1-21(f). Additionally, Respondent was convicted of committing and conspiring to commit health care fraud in violation of N.J.S.A. 45:1-21(k). After a finding of liability, and that a cause for disciplinary action had been established was announced orally on the record, the hearing then proceeded to the mitigation phase. Respondent's attorney presented seven character witnesses including friends and family members who attested to Respondent's dedication, competence, and his good ethical and moral character, as well as a written statement prepared by Respondent and read into the record by his wife. Respondent, in that statement, represented that he had been verbally told by prison officials that he could not obtain

a furlough to appear in person at the Board's hearing. Respondent also explained that he had no knowledge of his prior employer submitting fraudulent bills to Medicare, however he accepted full responsibility for his actions and expressed remorse for not having been more diligent in preventing the fraudulent billing practices of his employer. Respondent further requested that the Board take into consideration his unblemished record for the past eleven years as a New Jersey practicing podiatrist.

In closing, Respondent's attorney quoted from the January 6, 2010 sentencing transcript noting that Judge Kimba Wood stated that Respondent had not fallen afoul of the law after leaving his employ at Citywide Footcare and that Respondent's rehabilitation deserves credit, thus Respondent was sentenced at the bottom of the Criminal Advisory Guideline level. Finally, counsel made no objection to the State's assessment of costs outlined in the State's Cost Application.

The Board finds that it is undisputed that Respondent engaged in and pled guilty to committing and conspiring to commit health care fraud under 18 U.S.C. §§371 and 1347. Further, in his Plea Agreement (POD Exhibit B), Respondent acknowledged that he accepted the agreement and pled guilty because he is, in fact, guilty, and agreed that he would not attack the guilty plea or conviction either collaterally or on direct appeal regardless of possible consequences to his professional license. Respondent will not be

permitted to represent under oath to the court that he is guilty in order to obtain a lesser criminal sanction, then subsequently assert to the Board he is not guilty in order to avoid discipline against his license. Respondent's federal criminal conviction provides ample grounds to take disciplinary action against Respondent's license.

The Board afforded particular deference to the sentencing Judge and noted that in the sentencing transcript Judge Wood stated that Respondent lied to Medicare for at least four years, leading to a loss of over \$90,000, and that Respondent had at no time taken any steps to stop or report the crime. In addition, Respondent was familiar with proper billing and patient record practices as at the time of the conduct he was an experienced practitioner not new to the podiatric profession. We note that Judge Wood, also indicated that Respondent admitted fraudulent misconduct and such conduct directly impacts the public health, safety and welfare, and she considered general deterrence of Medicare Fraud an important factor in Respondent's sentencing.

"... it is a sentence of custody that most strongly effectuates general deterrence". (Sentencing Transcript dated January 2, 2010, attached to Respondent's submission May 11, 2010).

The Board has clear authority to take disciplinary action against a licensee who engaged in serious health care claims fraud over a lengthy period, at a time in his career when he was an

experienced practitioner. In addition, the totality of the criminal sanction - the 18 month prison sentence coupled with the imposition of three years of supervised probation and restitution in an amount of over \$90,000 all demonstrate that the court viewed respondent's crime as serious which also merits imposition of significant discipline by this Board. It is the Board's responsibility to protect consumers of health care services by assuring the quality, integrity and honesty of its licensees. Health care claims fraud is not a victimless crime. Respondent for a lengthy period utilized his professional license to abscond with limited health care dollars and the crime of which he has been convicted has a direct impact on the public health, safety, and welfare. Furthermore, the public has the right to expect honesty and integrity from licensed health care providers. It is the Board's mandate to protect patients and the health care system at large from licensees who are dishonest in their billing practices. Therefore we have determined that revocation is the appropriate penalty.

We further find that the State's Cost Application has not been objected to nor has Respondent claimed any inability to pay. We find the State's application to be sufficiently detailed to permit our conclusion that the amount of time spent on each activity, and the overall fees sought are supported and objectively reasonable. (See, Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996). We

find the Attorney General's claims for attorneys fees and costs of investigation are reasonable especially when viewed in the context of the seriousness of the conduct and therefore order full payment of \$8,868.46.

ACCORDINGLY, IT IS on this 23rd day of Aug 2011,

ORDERED THAT:

1. Respondent's license to practice podiatric medicine in the State of New Jersey be and hereby is revoked effective nunc pro tunc to April 6, 2010.

2. Respondent may petition for reinstatement of his license to practice medicine (18) months after the date of his release into the community from federal prison and the Toler House.

3. Respondent is assessed attorney fees and costs of the investigation to the State in this matter in the amount of \$8,868.46. Payment for the costs shall be submitted by certified check or money order, made payable to the State of New Jersey and

shall be sent to William Roeder, Executive Director, Board of Medical Examiners, P.O. Box 183, 140 East Front Street, 2nd Floor, Trenton, New Jersey 08625-0183 no later than thirty (30) days from the entry of this Final Order.

4. Prior to Board consideration of any application for reinstatement of his license, Respondent shall:

(a) fully attend, successfully complete, and pass the ProBE

(Professional Problem Based Ethics) course and a Medical Billing course approved by the Board in writing prior to attendance. Documentation of full attendance and successful completion of the course shall be provided to the Board.

- (b) If requested by the Board, appear before the Board or a committee thereof, to discuss his clinical competence, rehabilitation, and his readiness to re-enter the practice of podiatric medicine;
- (c) Provide documentation of successful completion of all criminal sentencing, probation terms, and supervised release, including but not limited to documentation that he is current in his obligations concerning payment of criminal fines and restitution;
- (d) Provide documentation of successful completion of all application requirements including but not limited to a completed application for reinstatement along with the requisite fees, and the required Criminal History Background Check; and
- (e) Provide documentation of successful completion of all continuing education credits required for the period

during which his license was revoked.

- (f) Upon reinstatement of Respondent's license to practice podiatric medicine, the Board, in its discretion, may impose conditions or restrictions on licensure it deems necessary to protect the public health, safety and welfare.


7. Failure to remit any payment required by this Order will result in the filing of a certificate of debt and such other proceeding as permitted by law.

8. Failure to comply with any of the terms of this Order may result in further disciplinary action.

9. This Order is effective upon its filing date with the Board of Medical Examiners with a retroactive revocation date.

10. Respondent is bound by the Directives Applicable to any Board licensee who is Disciplined or whose Surrender of Licensure has been Accepted (attached and made a part hereto).

NEW JERSEY STATE BOARD OF
MEDICAL EXAMINERS

By: 
Paul Jordan, M.D.
Board President

**DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE
WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE
HAS BEEN ACCEPTED**

APPROVED BY THE BOARD ON MAY 10, 2000

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the Addendum to these Directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

1. Document Return and Agency Notification

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

2. Practice Cessation

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership.

Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

4. Medical Records

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

5. Probation/Monitoring Conditions

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

**NOTICE OF REPORTING PRACTICES OF BOARD
REGARDING DISCIPLINARY ACTIONS**

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.